

Before the  
FEDERAL COMMUNICATION COMMISSION  
Washington, D.C. 20554

FCC 92-538

In the Matters of )  
)  
Rulemaking to Amend Part 1 and Part 21 ) CC Docket No. 92-297  
of the Commission's Rules to Redesignate )  
the 27.5 - 29.5 GHz Frequency Band and ) RM-7872; RM-7722  
to Establish Rules and Policies for )  
Local Multipoint Distribution Service; )  
)  
Applications for Waiver of the )  
Commission's Common Carrier Point-to- )  
Point Microwave Radio Service Rules;<sup>1</sup> )  
)  
Suite 12 Group Petition for Pioneer's ) PP-22  
Preference; )  
)  
University of Texas - Pan )  
American Petition for Reconsideration )  
of Pioneer's Preference Request Denial )

DISPATCHED  
JUN 11 8 21 AM '93  
FCC MAIL SECTION

NOTICE OF PROPOSED RULEMAKING, ORDER,  
TENTATIVE DECISION AND ORDER ON RECONSIDERATION

Adopted: December 10, 1992 Released: January 8, 1993

Comment Date: March 16, 1993

Reply Comment Date: April 15, 1993

By the Commission:

TABLE OF CONTENTS

<u>Subject</u>	<u>Paragraphs</u>
I. Introduction . . . . .	1-4
II. Background . . . . .	5-13
III. Discussion	

<sup>1</sup> A list of applications identified to date is provided in Appendix C. Should any further waiver applications be identified in the future, we hereby delegate authority to the Common Carrier Bureau to dismiss them in accordance with the holding in this Order.

LMDS Demand . . . . .	14-19
Structure of the 28 GHz Band for Licensing . . . . .	20-22
Technical Issues . . . . .	23-24
Regulatory/Licensing Issues . . . . .	
Status of Licensees . . . . .	25-26
Regulation of Common Carriers . . . . .	27
Preemption . . . . .	28-29
Service Areas . . . . .	30-31
Service of minimum areas and/or populations . . . . .	32
Cross-ownership . . . . .	33-34
Selection from among mutually exclusive applicants . . . . .	35-36
Preferences . . . . .	37
Settlements . . . . .	38
License term and transfer of control/assignment . . . . .	39-41
Application requirements . . . . .	42-44
One-to-a-market . . . . .	45
Financial showing . . . . .	46-47
Construction requirement . . . . .	48
Filing date . . . . .	49
Fees . . . . .	50
IV. Pending Applications . . . . .	51-53
V. Pioneer's Preference . . . . .	54-68
VI. Conclusion . . . . .	69
VII. Procedural Matters . . . . .	
Ex Parte Rules - Non-Restricted Proceeding . . . . .	70
Initial Regulatory Flexibility Analysis . . . . .	71-77
Comment Dates . . . . .	78-79
Ordering Clauses . . . . .	80-84

## I. INTRODUCTION

1. This Notice of Proposed Rulemaking and Tentative Decision (NPRM) proposes a redesignation of use of the 28 GHz band from point-to-point microwave common carrier service to a local multipoint distribution service. In separate sections of this document, we address pending waiver applications in the Common Carrier Point-to-Point Microwave Radio Service filed in anticipation of our action on the instant petitions for rulemaking, (Section IV). In addition, we address two petitions for pioneer's preference, one of which is before us on a petition for reconsideration of the staff's action dismissing the request, (Section V).

2. We initiate this NPRM in response to a petition filed by Suite 12 Group ("Suite 12"), a group of inventors who have engineered a millimeter wave component technology which can be used to offer video and other communications services in the 27.5 - 29.5 GHz frequency range ("28 GHz band"). We have received two other petitions for rulemaking which affect the 28 GHz band. In response to Suite 12's petition for rulemaking, Video/Phone Systems, Inc. (Video/Phone) proposes a Local Wireless Broadband Service (LWBS) for the 28 GHz band in a separate rulemaking petition. In addition, Harris Corporation (Farinon Division) (hereinafter "Harris") filed a petition for rulemaking (RM 7722) suggesting that the Commission implement a uniform channelization plan

for the 28 GHz band so that equipment manufacturers would have a standard to apply for the development of new technology.

3. In this proceeding we propose to accommodate the Suite 12 and Video/Phone requests. The 28 GHz band is virtually unused, and the proposals before us, if developed to their apparent potential, will provide consumers with additional options by which to satisfy video and other telecommunications requirements. Among the primary regulatory objectives of this proceeding are providing applicants in this band sufficient flexibility to satisfy consumer demand, expediting service to the public, making more efficient use of essentially fallow spectrum, and streamlining the licensing process while deterring speculative applications. We propose licensing and regulatory policies that, in our experience, should serve these objectives. We seek comment on proposals to license two licensees in each area; adopt minimal technical rules to accommodate multipoint video programming distribution, wideband video, data, and other telecommunications services; require that service be available to 90% of the residents within a service area within 3 years; adopt one-day-filing; use lotteries or auctions to select licensees; and employ minority and diversity of ownership preferences. We also deny 971 pending waiver applications that seek to establish point-to-multipoint video distribution services without benefit of the instant rulemaking to amend the current Common Carrier Point-to-Point Microwave Service rules.

4. Suite 12's and Video/Phone's proposed redesignation of the 28 GHz band is for a service which meets the generic standards of a multipoint distribution service. However, due to the novel technology which uses a cellular distribution format and a greatly expanded range of services which can be offered, we find that this service is separate and distinct from other types of multipoint distribution services. Accordingly, we propose to title the new service Local Multipoint Distribution Service (LMDS) and propose new rules suited to the technology and distribution format to be used.

## II. BACKGROUND

5. The 28 GHz band has been available for point-to-point microwave radio common carrier use since 1959. Nevertheless, until 1991, the only licensees for the 28 GHz band were for a few temporary fixed licenses authorized under Part 21. Very little, if any, common carrier point-to-point use of the frequency band has been made since 1959.<sup>2</sup>

---

<sup>2</sup> We have received an application from Motorola Satellite Communications, Inc. to use 100 MHz within the 27.5 - 30 GHz band for gateway/control satellite uplinks in the fixed satellite service (FSS) to support its proposed "Iridium" low earth orbit mobile satellite service. (File Nos. 9-DSS-P-91(87) and CSS-91-010, Public Notice date April 1, 1991, Report No. DS-1068). In addition, the NASA Advanced Communications Technology Satellite (ACTS) is scheduled to be launched in June or July 1993. This satellite will operate from 100° W.L. with 29-30 GHz uplinks and 19.2 - 20.1 GHz downlinks. This program intends to provide several services including T-1 VSAT networks within 100 mile radius of several major metropolitan areas on frequencies 29.242 GHz +/- 20.5 MHz, 29.263 GHz +/- 82.5 MHz and 29.298 GHz +/- 20.5 MHz. See

6. In 1991, the Commission authorized a wholly-owned affiliate of Suite 12 to construct a system in the New York Primary Metropolitan Statistical Area (PMSA) using millimeter wave technology to provide video service. Hye Crest Management, Inc., 6 FCC Rod 332 (1991). The application proposed a new fixed station in the 28 GHz band to provide 24 channel television service in New York City. The licensee, Hye Crest, was granted waivers of Sections 21.108 (directionalization and bandwidth requirements) and 21.700 (status eligibility). Hye Crest also received a designated service area, the New York PMSA. Hye Crest subsequently requested and received authorization for a major modification of its license to change the transmitter type to offer 49 television channels within 1000 MHz of spectrum. Hye Crest filed its Certification of Completion of Construction for its first facility located at Brighton Beach, New York (FCC Form 494A) on July 1, 1992. Hye Crest's authorization is for a five year period. Since granting Hye Crest's initial authorization, we have received 971 applications accompanied by petitions for waiver of the Commission's rules from entities seeking to provide service similar to that of Hye Crest around the nation. On October 29, 1992, the Common Carrier Bureau released an Order (In the Matter of Rulemaking to Amend Part 2 and 21 of the Commission's Rules to Redesignate the 27.5 - 29.5 GHz Frequency Band, and to Establish Rules and Policies for Multichannel Local Distribution Service, DA 92-1488) announcing that applications in the 28 GHz band would no longer be accepted for filing pending the outcome of the instant rulemaking proceeding.

7. As discussed above, three petitions for rulemaking were filed proposing a variety of uses for the 28 GHz band. The Harris and Suite 12 petitions were placed on public notice<sup>3</sup> for comment; the Video/Phone petition was a comment to the Suite 12 petition and was not placed separately on public notice.

8. Suite 12 Petition. Suite 12 states that the technology it proposes is "capable of immediately providing interactive high quality video, voice, and data services. . . ." It argues that LMDS will help meet the public demand for additional multichannel video programming and for two-way voice and data service. Suite 12 argues that the public will benefit from having an "innovative and competitive two-way interactive communications system" capable of providing the equivalent of fiber cable service without the need to wire a community. Suite 12 states that its system is capable of incorporating future technological advances such as high definition television and digital communications.

9. The system is a multicell configured distribution system with a return path capability. The video channels (20 MHz) are transmitted over 1 GHz of

---

paragraph 22, infra.

<sup>3</sup> Petition for Rulemaking filed by Harris Corporation (Farinon Division), RM 7722, Public Notice Report No. 1845, released May 15, 1991; Petition for Rulemaking filed by Suite 12 Group, RM 7872, Public Notice Report No. 21049, released December 16, 1991.

spectrum with the same polarization. Two-way communication channels are inserted between the video channels and are transmitted with opposite polarity. The system uses an omni-directional antenna to transmit from the node, or center of the cell. The subscriber's receiver antenna uses a narrow beamwidth to eliminate multipath reception and to obtain sufficient link margin for service. Each cell is designed to be between 6 to 12 miles in diameter, and shadowed areas are served with a repeater or reflector. The system avoids interference between adjacent cells by cross-polarizing the signals and by taking advantage of the discrimination provided by the subscriber receiving antenna. Suite 12 states that its system makes exceptionally efficient use of the frequency spectrum.

10. Video/Phone Petition. Video/Phone is supportive of Suite 12's technology but criticizes it for confining its suggested rules only to video programming service, with secondary communications services. Video/Phone proposes that a Local Wireless Broadband Service would respond to the growing demand for video telecommunications services such as videoconferencing, telecommuting, telemedicine, and education. Video/Phone argues that the lack of economic transmission capability at the local loop has heretofore hindered the growth of these services, which it argues, would have been substantial. Accordingly, Video/Phone proposes rules intended to permit flexible use of the 28 GHz spectrum and Suite 12's technology to provide a wide variety of communication services to the public.

11. Harris Petition. Harris proposes that the Commission amend Parts 2, 21, and 94 of the Rules to adopt a channelization plan with multiple bandwidth options for the 28 GHz band and to make the band available for assignment to private carriers under Part 94. Harris argues that manufacturers find it difficult to design and market equipment due to uncertainty regarding channel pairings, bandwidths, channel spacings, etc. Harris also argues that the Commission has adopted frequency sharing between private carriers and common carriers. Furthermore, Harris argues that broad eligibility rules will result in greater and more efficient use of the 28 GHz band. Harris argues that the band could be used to facilitate the implementation of personal communications services through the interconnection of microcells. Finally, Harris argues that private radio use should be permitted for the band because, it contends, the Operational Fixed Microwave Radio Service (OFS) bands below the 28 GHz band are heavily used.

12. Harris opposes Suite 12's proposal, arguing that there is an imminent need for point-to-point spectrum. If redesignation is undertaken, Harris suggests that LMDS assignments be limited to one half of the band and the International Radio Consultative Committee (CCIR) channelization plan be implemented so that multiple uses of the spectrum can be made, including point-to-point services. Harris provides no evidence of either manufacturer or subscriber interest in the 28 GHz band for conventional private or common carrier point-to-point use, however.

13. The Wireless Cable Association (WCA) believes that a redesignation is premature. It argues that wireless cable licensees in the Multichannel Multipoint Distribution Service (MMDS) are at a competitive disadvantage because of their limited channel capacity. WCA also argues that the wireless

cable operators are at a competitive disadvantage due to expansion of telephone companies into video dialtone, and the entrance of franchised cable operators into two-way voice and data services. It contends lack of available spectrum for wireless cable operators has been a brake to their expansion into both video and two-way communications services. Accordingly, WCA is interested in the use of the 28 GHz band for wireless cable operators. Nevertheless, WCA argues that Suite 12 has failed to produce test results into the record that would establish the viability of its system. Finally, WCA argues that if the 28 GHz band is redesignated for Suite 12's technology, that the public interest may be best served by setting aside spectrum for local wireless cable operators to expand.

### III. DISCUSSION

#### IMDS Demand

14. We believe that the record compiled thus far establishes that 1) the 28 GHz band is not being utilized; 2) Suite 12 and others have demonstrated an interest and ability to use it; 3) the most likely use will be to provide video programming, and that such use will serve the public interest, and 4) we should not limit the use of the band only to video service.

15. Technological advances in the use of radio technology are making possible wider use of spectrum in lower bands and opening use of the higher frequency bands not heretofore possible. One of these advances has been made by Suite 12, which has developed and patented the equipment it hopes to place in subscribers' homes. Suite 12's representations that the proposed redesignation will serve the public interest are supported by its bringing IMDS service to Brighton Beach. In addition, the number of applications received seeking to provide similar service indicates a significant interest in both the technology and the service. Coupled with the volume of public inquiry regarding the service, we find that there is strong public interest in the proposed redesignation.

16. The interest in spectrum for video services, as evidenced by Suite 12's developmental work and the growth of conventional cable subscribership,<sup>4</sup> supports a tentative conclusion that video programming will be the largest and most commercially significant use of this spectrum at this time. Moreover, such use of the 28 GHz band would provide additional competition to franchised cable companies. A new source of competition for franchised cable companies, wireless cable companies, and other video service providers furthers our goal of using the disciplines of the marketplace to regulate the price, type, quality and quantity of video services available to the public. Accordingly, we propose to redesignate the 28 GHz band fixed service allocation to any video or telecommunications use on either or both the vertical and horizontal

---

<sup>4</sup> In the last decade, the number of households subscribing to conventional cable television service has increased from 21 million in 1982 to 53 million in 1992. 1992 Television and Cable Fact Book, Cable and Services Vol. 60, p. G-64.

polarization planes of the assigned frequency, which the public may require in a particular location.

17. We intend that the rules we promulgate in this proceeding reflect the maximum flexibility for licensees to construct communications systems in which the public is interested. Suite 12's technology offers the promise for a wide variety of applications that could be tailored to local interests. In this sense, it responds to Video/Phone's concerns, because the uses for the 28 GHz band it proposes could be incorporated into service capabilities of the multicell technology if local demand warrants. We therefore seek to establish rules that provide adequate spectrum for multipoint video programming distribution services and to provide sufficient flexibility to accommodate different types of point-to-point and point-to-multipoint communications services.

18. WCA's concern that licensees in the Multichannel Multipoint Distribution Service will face undesirable competition during its start-up period is unsupported. The existing industry has had a de facto head start which moots WCA's concern. We have granted more than 900 applications for wireless cable licenses to date, while potential IMDS licensing awaits this rulemaking proceeding, and video dialtone applications are only now being filed. Thus, MMDS wireless cable systems have had, and will continue to have, a significant opportunity to develop and refine their services and to establish market position.

19. WCA proposed that we set aside a portion of the 28 GHz band for MMDS operators because one of the obstacles facing the MMDS industry is acquiring enough spectrum to provide a service competitive with the franchised cable systems. We do not perceive a compelling public interest justification for setting aside 28 GHz spectrum for MMDS system operators.<sup>5</sup> We have recently allocated additional spectrum for wireless cable operators. Second Report and Order, Gen. Docket No. 90-54, 6 FCC Rcd 6792 (1991). We also have proposed rule changes to expedite processing. Notice of Proposed Rulemaking in PR Docket No. 92-80, 7 FCC Rcd 3266 (1992). Accordingly, we do not propose to set aside any portion of the 28 GHz band for MMDS licensees, but we invite comments to address this tentative conclusion, focussing particularly on whether the public interest would be served by a set-aside.<sup>6</sup>

---

<sup>5</sup> In the Domestic Public Cellular Radio Telecommunications Service (DPCRTS), the Commission set aside one-half the available spectrum for assignment to Local Exchange Carriers (LECs or wireline carriers) upon a finding of compelling public need for a wireline set-aside. Cellular Lottery Order, 98 FCC 2d 175 (1984).

<sup>6</sup> The University of Texas has requested that we consider reserving one-half the available 28 GHz band for educational use. Accordingly, we also seek comment on the probable relative demand of commercial video entertainment programming and educational or other non-commercial programming on the 28 GHz band and whether the Commission should consider reserving one-half of the spectrum for non-commercial use.

### Structure of 28 GHz Band

20. We propose, in accordance with Suite 12's and Video/Phone's suggestion, that the 28 GHz band initially be licensed in two blocks of 1000 megahertz each to two different carriers. Each assignment will be optimized on a cell by cell basis, for video services on the one (horizontal/vertical) polarization, and for other services on the other (vertical/horizontal) polarization. Suite 12's patented technology, the only equipment which appears to be capable of providing direct customer services in the 28 GHz band at this time, uses channels of 20 MHz to provide video service. Since it appears that video service will be, at least initially, the primary service offered in IMDS, we propose to divide each 1000 megahertz band into channels of 20 MHz each; licensees of the respective blocks will then have flexibility to use or lease portions of one or both polarization directions in each cell and to provide a wide variety of services. Thus, each licensee will be able to provide a minimum of 49 video programming channels to the public using the full 1000 megahertz assignment on one polarization direction in each cell. Licensees will also have the opportunity to supplement their video programming with telecommunications services (such as point to multipoint video, data or telephony services) on the full 1000 megahertz assignment by using the opposite polarization from the video service, and by using frequency offsets and the multicell point-to-multipoint distribution structure. This channelization plan provides licensees the flexibility to offer different telecommunications services in every cell in the designated authorized area to meet the demands of the marketplace for these services. The 27.5 - 28.5 GHz band will be designated the "A-Band," and the 28.5 -29.5 GHz band will be designated the "B-Band." We seek comment on this assignment scheme.

21. We also seek comment on whether other assignment schemes might better meet our objectives. For example, four blocks of spectrum could be assigned to different licensees instead of two blocks. In this scheme, two larger blocks of spectrum, enough to offer about 34 video channels, could each be assigned to new licensees for IMDS video programming services, and the two smaller blocks of spectrum could each be assigned to other users, possibly to applicants proposing only telecommunications services or a smaller video system. Other assignment schemes may also offer the possibility of providing either additional video programming competition or telecommunications options for subscribers as needs and markets develop in an area.

22. We also seek comment on whether a separate assignment is specifically required to accommodate the proposed satellite service applications in this band or whether adequate coordination and sharing criteria could be developed to permit both terrestrial and fixed satellite services to operate compatibly in the band. None of the commenters discussed existing or proposed satellite use of the band. Normally the Fixed Satellite Service can share with point to point services in an area, as evidenced by the successful sharing of the 4/6 GHz band. However, the multicell multipoint configurations in this proposal envision a wide area distribution of services which may foreclose the possibility of acceptable sharing conditions between satellite and terrestrial services. Proposed satellite use (see note 1, *supra*) is focused in the B-Band (28.5 - 29.5 GHz) segment.

## Technical issues

23. The Commission's technical regulations have in the past provided guidance to manufacturers as to the minimum specifications necessary for equipment type acceptance or certification for service. In addition, technical regulations are designed to ensure minimum service performance and facilitate spectrum management, interference control and coordination among individually licensed stations nationwide. Each licensee would have control over its own facilities within its designated service area and would therefore be responsible for minimum service performance and interference levels within its system. The licensee, however, may need to coordinate its operations with other entities licensed to provide service in adjacent designated areas to avoid mutual interference situations. Hence, we must establish regulations to facilitate interference control, spectrum management and coordination at the designated service area interfaces. In addition, coordination requirements and sharing criteria may need to be developed to reflect satellite use. Overall, however, we have an opportunity to be less restrictive in developing technical standards and to promote flexibility for the licensee to meet market demands of the consumer in the designated service area. Although we propose 20 MHz channels for licensing purposes, once licensed, the licensee would not be restricted to specific bandwidth, emission characteristics, etc. and could change the traffic mix within the frequency assignment to meet the requirements of the individual community served by a cell or multiple cells.

24. The three petitions propose a wide range of technical regulations, from a very detailed channelization plan with multiple bandwidth options to a more flexible approach which envisions no restrictions on bandwidth, channelization plan, emission or modulation characteristics. Since the petitions propose to provide licenses for stations over a limited geographical area corresponding to metropolitan statistical areas, they propose some restrictive technical standards and regulations. Given the propagation characteristics of the band, we believe only limited technical regulations may be needed to insure adequate interference control and coordination of services at the interfaces of the designated service areas within each 1000 MHz spectrum block.<sup>7</sup> We seek comment on the need for technical standards, if any, and specific proposals for power, modulation requirements, channelization, bandwidth, emission characteristics, frequency stability, antenna characteristics, gain, beamwidth, height and polarization and spectrum utilization, as appropriate. We recognize the need to protect stations operating outside the frequency band. The emissions limitations in Part 21 appear to be sufficient to meet this concern. Spectrum utilization would address any questions of spectrum efficiency including minimum standards that should be enforced and how these standards should be determined. Parties should also consider whether technical rules should be adopted to accommodate existing and proposed satellite use of the band.

---

<sup>7</sup> Coordination is required within the border areas with Canada and Mexico. We believe that in these circumstances regulations would be required to coordinate with our neighbors individual stations within 56 km of the border to insure interference protection to and from stations across the border.

## Regulatory/Licensing Issues

25. Status of Licensees. Suite 12 suggested that the Commission authorize video service distributors in the 28 GHz band as non-common carriers, while Video/Phone proposed that parties be allowed to elect either common carrier or non-common carrier status. In National Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 630 (D.C.Cir. 1976), the United States Court of Appeals for the District of Columbia Circuit defined a non-common carrier as one whose practice is to make individualized decisions, in particular cases, whether and on what terms to deal, and who is under no compulsion to offer its services indifferently. A common carrier is one which holds itself out indifferently to serve those who seek to avail themselves of the carrier's particular services, or is under a legal compulsion to do so.

26. We have allowed service providers to elect common carrier or non-common carrier status in a number of radio services licensed by the Commission. For example, we have allowed licensees of satellite transponders to provide service as a non-common carrier entity. We also have allowed Multichannel Multipoint Distribution Service licensees to choose their own status. We have found that doing so furthers the Commission's goals of ensuring that the communications needs of the public are met by allowing marketplace forces to shape the development of service providers. See, e.g., Wold Communications, Inc. v. FCC, 735 F.2d 1465 (D.C. Cir. 1984); Domestic Fixed-Satellite Transponder Sales, 90 FCC 2d 1238 (1982); Revision to Part 21, Report and Order, 2 FCC Rod 4251, 4253 (1987). As we have done with MDS, we propose that IMDS licensees choose whether they will operate as a common or non-common carrier on a channel-by-channel and/or cell-by-cell basis. We request comments on this issue, with particular emphasis on the effects status election would have on consumers.<sup>8</sup> We also invite comment on the basis on which the selection should be made. In addition, we seek comment on whether the non-video services provided by IMDS licensees should be regulated as common carrier services,<sup>9</sup> and on the jurisdictional implications of allowing election by a local exchange carrier of non-common carrier status in the proposed service.<sup>10</sup>

---

<sup>8</sup> With regard to notification of status election, parties should note the process currently used by MDS licensees (47 C.F.R. § 21.900, ff.). We request interested parties to comment on the usefulness of these procedures for IMDS licensees.

<sup>9</sup> See In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, Notice of Proposed Rulemaking (Gen. Docket No. 90-314, ET Docket No. 92-100) 7 FCC Rod. 5676 (1992). We also seek comment on the application of our video dial tone policies to common carriers providing video services over IMDS.

<sup>10</sup> To the extent that IMDS could be used as a resold telephone service, the Commission has determined that, under Section 332 of the Communications Act, a private land mobile radio licensee may not resell interconnected telephone service for profit. Amendment of Part 90 of the Commission's Rules to Prescribe Policies and Regulations to Govern the Interconnection of Private Land Mobile Radio Systems, 93 FCC 2d 1111, 1115 (1983), on recon., 49 Fed. Reg.

27. Regulation of Common Carriers. We tentatively propose that IMDS operators electing common-carrier status for part or all of their systems should be classified as "non-dominant" carriers, and subject to streamlined tariff regulation as with MMDS.<sup>11</sup> A non-dominant carrier is one which has insufficient market power to practice anti-competitive pricing. Id. Although we propose to reallocate a large quantity of spectrum to IMDS, and to assign each operator one gigahertz of spectrum, we tentatively conclude that both video and telecommunications services are so well represented in the marketplace that no IMDS operator will have a monopoly or near-monopoly position. For example, in the video distribution market, IMDS faces competition from MMDS, cable television, low-power television, domestic fixed satellites and broadcast television stations. Revisions to Part 21, supra. The telecommunications market includes long-distance telephone service, local exchange service, fixed cellular services, fixed satellite communications, private carriers, and Personal Communications Systems (PCS). Accordingly, it appears that IMDS, while it may find a market niche in particular areas, is unlikely to develop into a monopoly service. Should it do so, we could reassess its regulation.

28. Preemption. For IMDS licensees choosing non-common carrier status, "[p]reemption is primarily a function of the extent of the conflict between federal and state and local regulation." In the Matter of Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities, 101 FCC2d 952, 959 (1985). To the extent such systems provide video entertainment programming, we tentatively conclude that state entry and rate regulation should be preempted. Beyond that, at this stage, the record in this proceeding does not contain any information regarding the extent to which state and local regulations might conflict with provision of IMDS. State law which conflicts with the federal provisions must be preempted, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963); however, we require a factual record on this subject prior to making any final preemption determination. Based on the rules proposed herein, and any additional rules, especially of a technical nature

---

26066 (1984), aff'd by judgement sub nom. Telocator v. FCC, 764 F.2d 926 (D.C. Cir. 1985) (Table); In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, - FCC Rod - (1992), Gen. Docket No. 90-314, (Notice of Proposed Rulemaking and Tentative Decision) paras. 97-98, note 64. Accordingly, we ask for comment on this issue, in particular, whether IMDS could be classified as a resold telephone exchange service, whether IMDS licensees may operate as private land mobile radio licensees, and what implications operation of such resold telephone service by local exchange carriers (or others) operating as IMDS licensees would have.

<sup>11</sup> History and prior citations noted in Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities (Sixth Report and Order), 99 FCC2d 1020 (1985), rev'd and remanded sub. nom. MCI Telecommunications Corporation v. FCC, 765 F.2d 1186 (D.C. Cir. 1985); vacated in part, AT&T v. FCC, No. 92-1053 (D.C. Cir., November 13, 1992). Commenters should discuss the implications of our competitive carrier policies for participation in IMDS by telephone companies.

suggested by commenting parties, we request comment on the extent to which the Commission may be required to preempt state entry and/or rate regulation of IMDS licensees choosing non-common carrier status.

29. For IMDS licensees choosing to maintain common carrier status, this Commission can preempt state regulation of video service since it is inherently interstate in nature. United States v. Southwestern Cable Co., 392 U.S. 157, 168-169 (1968); New York State Commission on Cable Television v. F.C.C., 669 F.2d 58, 65 (2d Cir. 1982). However, for IMDS licensees providing common carrier telecommunications services, we have jurisdiction only over interstate portions of those services, unless the intrastate services are not severable from the interstate services, and the state regulations thwart or impede federal law and policies. See, e.g., Louisiana PSC v. FCC, 476 U.S. 355, 375 n. 4 (1986); National Association of Regulatory Utility Commissioners v. FCC, 880 F.2d 422 (D.C. Cir. 1989); Computer III Remand Proceedings, 6 FCC Rod 7571, 7625-7637 (1991); Mobile Telecommunications Technologies Corporation, 7 FCC Rod 4061 (1992). Accordingly, for IMDS telecommunications services, the first question we must consider in this proceeding is whether IMDS telecommunications services can be severed into intrastate and interstate components. If they cannot be severed, the Commission must show on a factual basis that potential state regulation would thwart or impede the Commission's interstate regulatory objectives for IMDS. Having incomplete technological information on the manner in which IMDS systems will operate, we are not in a position to determine at this time whether it is appropriate to preempt state entry and/or rate regulation of common carrier IMDS. Moreover, we do not have evidence that any particular state regulatory policies regarding inseverable intrastate IMDS services would thwart or impede our efforts in establishing this new service. We request that parties, especially Suite 12 as the system inventor, and Video/Phone as the proponent of using the 28 GHz band for telecommunications services, provide information regarding the structure of system operations in light of our need to determine the interstate/intrastate nature of potential telecommunications services, and on whether any preemption of state regulation of intrastate common carrier non-video services is necessary.

30. Service Areas. We propose to license IMDS by the 487 "Basic Trading Areas" (BTAs) identified in the Rand McNally 1992 Commercial Atlas and Marketing Guide, 123d edition, pp. 36-39 plus Alaska and Puerto Rico, for a total of 489 regional licenses encompassing all land areas within the United States. In Personal Communications Services - FCC Rod - (1992), Gen. Docket No. 90-314, paragraphs 56 - 61 (Notice of Proposed Rulemaking and Tentative Decision) (PCS NPRM) we discussed the relative benefits and drawbacks of smaller and larger service areas in connection with Personal Communications Services (PCS). Although PCS and IMDS are not necessarily similar services, a number of the considerations discussed in the PCS NPRM regarding BTAs as one of several options posed for that service may apply to IMDS as well. In particular, we are interested in facilitating natural market area licenses in order to achieve three goals. First, the Basic Trading Areas comprise areas within which consumers have a community of interest. Their use for licensing purposes reinforces this identity; a different scheme may not. Second, we wish to maximize the competitive strength of IMDS stations in order to provide as much competition in video distribution and telecommunications services as

possible. We noted in Personal Communications Services that the cellular industry might have benefitted from larger initial licensing areas, since many licensees have expended large sums to combine metropolitan area and rural area licenses in consolidated systems. On the other hand, the costs associated with marketing and providing a new collection of LMDS services to the public may be prohibitive in larger population or geographic areas. We seek to find an appropriately-sized service area for LMDS in order to take advantage of economies of scale necessary to support a successful enterprise. Finally, we hope to facilitate applications processing. BTAs provide an easily identifiable and manageable number of discrete filing areas covering all areas of the country. Parties may also consider as alternatives to BTAs the 47 "Major Trading Areas" identified in the Rand McNally guide, supra, or smaller, cellular-type metropolitan and rural service areas, or Areas of Dominant Influence (ADI).

31. We request comment on the alternative proposals. Commenters should focus on the economies likely to be encountered with LMDS, both video and telecommunications services; the comparative costs of building LMDS systems in smaller and larger service areas; which type of licensing would be most likely to best serve expeditiously the needs of rural areas; and which approach would enhance speed of service to the public. Parties are invited to comment on the competitive implications of each alternative.

32. Service of minimum areas and/or populations. In order to ensure that licensees fulfill their responsibility to use the radio spectrum efficiently and provide the best possible service to the public, we propose that within three years of being granted a license, licensees shall be capable of providing LMDS service to at least 90% of the population residing within the service area. We request comments on this proposal and welcome alternative suggestions.

33. Cross-Ownership. We do not propose to adopt cross-ownership restrictions unique to 28 GHz service. The Commission has imposed such rules in a variety of radio services (e.g., cable television cross ownership limitation in the Multichannel Multipoint Distribution Service) to limit the ability of firms having market power from exploiting that position to engage in activity that restricts output, results in uneconomic pricing, or otherwise would deprive consumers of the full benefits of new entry. The evidence before us suggests that the most likely first use of the 28 GHz band will be video entertainment programming, given Suite 12's experience and developmental activities. There is no assurance this will be the case, or that even if it is the predominant use, that it will be the most viable use in all geographic areas. In view of this uncertainty, we are inclined not to exclude any existing video distribution or telecommunications firm from constructing and operating 28 GHz facilities. We seek comment on our tentative policy conclusion that cross-ownership restrictions should not be imposed.

34. On the other hand, the recently-adopted Cable TV Consumer Protection and Competition Act of 1992, P.L. 102-385, Section 11, generally prohibits cable operators from holding a license for "multichannel multipoint distribution service" in their own franchise areas. Although LMDS is not the Multichannel Multipoint Distribution Service, the two services have many

similarities, including the method of product distribution. Accordingly, it appears that the intent of Congress to facilitate competition in the video distribution services would include a ban on cable ownership of IMDS licenses if used to distribute video programming.<sup>12</sup> We solicit parties' comments on the interpretation of the cross-ownership prohibition on MDS in the Cable Act as it applies to IMDS, and our tentative policy conclusion not to impose cross-ownership restrictions.<sup>13</sup>

35. Selection from among mutually exclusive applicants. The two traditional choices available for choosing from among mutually exclusive applicants are comparative hearing and random selection. A third option, competitive bidding, may be available if Congress enacts enabling legislation. Comparative hearings may be either full administrative hearings or expedited hearings conducted primarily through a written record. Full administrative hearings are extremely costly and time-consuming. Expedited "paper" hearings, while not as costly in time and resources as full administrative hearings, are nevertheless cumbersome. For example, proceedings to license the top-30 cellular markets through expedited hearing procedures took approximately two years.

36. Because of our interest in making as many innovative, competitive services available to the public as quickly as possible, we propose to use random selection, or competitive bidding, if authority is provided by Congress, to choose among any mutually exclusive IMDS applications. We request comments on which method would be best suited to this service. We also ask for comment on the specific form any lotteries should take. In our recent Notice of Proposed Rulemaking for the PCS service, we discussed ways in which the lottery system could be improved. We also asked questions on how to implement competitive bidding. PCS NPRM, *supra*, paras. 84 - 91. We ask for comment on these options in the context of this service.

37. Preferences. The Communications Act requires the Commission to ensure that any system of random selection "used for granting licenses or construction permits for any media of mass communications" gives significant preferences to applicants who own few other such licenses or who are members of a minority. 47 U.S.C. § 309(i)(3)(A). The Communications Act defines "media of mass communication" to include multipoint distribution service, "and other services, the licensed facilities of which may be substantially devoted toward providing programming or other information services within the editorial control of the

---

<sup>12</sup> We also request parties' comments on the question of whether local exchange carriers operating as wireless cable companies on IMDS would have anti-competitive implications and if so, what regulatory responses would be appropriate.

<sup>13</sup> To the extent that IMDS operators will provide video services, IMDS may be a "multichannel video programming distributor" under the Cable Act, Section 2(c)(12). If so, IMDS operators would have to comply with certain regulations that the FCC may adopt consistent with that Act. Interested parties may want to participate in those Cable Act proceedings. In particular, parties should review the Notices of Proposed Rulemaking in MM Dockets 29-259 and 92-264.

licensee." 47 U.S.C. §309(i)(3)(C)(i). Accordingly, since IMDS appears to be a medium of mass communications, we tentatively conclude that preferences for diversity and minority interests are appropriate for IMDS. We request comment on this issue.

38. Settlements. Settlement between mutually exclusive applicants may avoid the need for comparative hearing or random selection procedures and reduce administrative burdens, delay and expense. See, e.g., Second Report and Order, Gen. Docket No. 80-112, 50 Fed. Reg. 5983-01, para. 41 (February 13, 1985) (MMDS Lottery Order). However, our experience with cellular and MMDS licensing has shown that this purpose has not always been served by permitting settlements. To the contrary, the opportunity to settle is often perceived as making an application a "sure thing" in a game of chance, thus drawing thousands of insincere applicants hoping to profit from merely filing. Accordingly, the settlement rules have not promoted the public interest in licensing entities prepared to serve the public with needed communications services.<sup>14</sup> Thus, we propose to forbid any settlements among applicants for IMDS, and any alienation of interest in an application for IMDS. The rule we propose herein is based on the Part 22 Domestic Public Cellular Radio Telecommunications Service rule barring any alienation of interest in an application, and requires that each applicant file an independent, individual application. We welcome comment on our proposal.

39. License Term and Transfer of Control/Assignment. To further ensure that only sincere applicants interested in constructing and operating IMDS systems apply, we propose that licensees be barred from transferring an IMDS license until the system has been constructed, and in fact is serving the public.

40. Finally, because this is a new and unproven service, we propose a five-year license term. Renewal applications will permit the Commission to monitor the evolution of the service. We propose to adopt renewal expectancy rules and request comment on the details of such rules. We request comments on this proposal, and on whether a license term of ten years would be more appropriate for this service.

41. Our proposals herein are similar to the rules adopted in Interactive Video and Data Services, 7 FCC Rod 1630 (1992) (IVDS), recon pending. Our objective is to avoid having numerous applications filed by entities having no intention to provide service, but who only hope to profit from the transfer of an authorization. These insincere applications impose tremendous burdens on the Commission in terms of absorbing applications processing staff resources associated with extension of time requests and other filings designed to retain the license while the licensee tries to market the authorization. We ask commenters to consider our objective of limiting applicants to those ready, willing and able to provide service to the public.

---

<sup>14</sup> Settlement rule changes have been proposed to reflect this new policy in Revision of Part 22 of the Commission's rules governing the Public Mobile Services, 7 FCC Rod 3658, 3665 (1992).

42. Application requirements. We propose to adopt rules for application requirements similar to those used for cellular applications. Although these requirements demand vigilance and careful preparation on the part of applicants, the public interest is served because fewer processing delays contribute to licenses being made available as quickly as possible.

43. We propose that the standard to be met for IMDS applications be the "letter perfect" standard, rather than the present Part 21 standard of substantial compliance and opportunity to amend. The latter standard has proved to be administratively burdensome and may have contributed to delays in licensing MDS stations. Accordingly, IMDS applicants not meeting the proposed rule's requirements would be dismissed rather than, under the current Part 21 practice, being allowed to perfect their applications. We propose that detailed review occur after a lottery is held. Parties are invited to comment on this proposal, with particular emphasis on expeditious licensing of qualified applicants.

44. As an alternative, we request comment on whether a "post-card" application, requiring minimal information about the applicant, would be appropriate for IMDS. No technical or financial information would be required to enter the random selection procedure; however, the applicant would be required to certify that it complies with all eligibility rules. Applicants chosen as tentative selectee would have 30 days to file a complete, letter-perfect application for the Commission's consideration.

45. One-to-a-Market. As with cellular licensing, we propose that only one application per market area could be filed by each applicant. We propose that no interest, direct or indirect, would be permitted in another application for the same market, including pre-existing settlement agreements or understandings, which in any event we propose to prohibit. Interests in bona fide publicly-held corporations of less than one percent would not be cognizable interests for the purpose of this proposed rule. Parties are invited to comment.

46. Financial showing. Due to the large amount of bandwidth which each licensee would receive, and the responsibility each licensee would have to serve a large area, we believe that applicants should give an indication of their financial qualifications to construct and operate their proposed system. We propose to require applicants to meet the "firm financial commitment" standard which has been required of cellular applicants below the top 120 markets.

47. We propose that applicants be required to provide a proposal of service for 90% of the population within the service area within 3 years, a detailed business plan for meeting their plan of system construction and operation, and a showing of a firm financial commitment to construct the three year plan and to operate for one year after complete construction without additional revenue. Parties are invited to comment on this proposal.

48. Construction Requirement. To ensure that the public is served expeditiously, we propose to establish construction completion benchmarks. We

propose to require that licenses be conditioned on constructing the system within three years of the date of license grant. Whenever any portion of the system is ready to begin operation, the conditional licensee must file a Form 494A, Notification of Completion of Construction. Thereafter, the licensee need not file any additional notifications until the entire system is constructed. At that point, a letter notification must be filed on or before the third anniversary of license grant. We do not propose to grant extensions of this requirement. We invite comment and further suggestions.

49. Filing Date. We propose to establish a one-calendar-day filing opportunity for initial IMDS applications. We intend to announce a single date on which applications for each market area can be filed. This procedure would allow processing to go forward smoothly, with the Commission having foreknowledge of the amount of resources required to handle a known number of applications after the filing is completed. In addition, avoidance of the 60-day cut-off rule used for some other Part 21 applications will reduce the risk of "cookie-cutter" applications, i.e., mere copies of earlier filings, by insincere applicants. In addition, processing should be expedited due to the shortness of the filing period -- the public would not have to wait any additional time for the cut-off deadlines to pass. We do not propose to reopen the filing period until all first round applications are processed. Parties are invited to comment.

50. Fees. Section 8(a) of the Communications Act sets forth fees the Commission may assess and collect for filing applications to aid in recovering some of its administrative costs. Because this service is a type of multipoint distribution service, the Multipoint Distribution Service (MDS) fee structure applies. In MDS, a licensee pays an initial fee of \$155 per station for a conditional license and \$455 per radio channel per station when certifying that construction has been completed. IMDS, as proposed herein, will accommodate 50 channels using Suite 12's technology. Thus, each IMDS applicant would pay \$155 per station in its single application for the blanket license for fifty channels in either the A-Band or the B-Band. In addition, upon completion of construction of one or more initial cells, a fee of \$455 for each of the fifty 20 MHz channels, or \$22,750, would be payable. No further fee would be due for constructing the remainder of the proposed IMDS system.

#### IV. PENDING APPLICATIONS

51. We are also hereby denying the 971 waiver applications pending before us. All are based on existing point-to-point rules which are not structured to address the large amount of spectrum being allocated to individual licensees, nor the service area concept proposed herein, nor the technical parameters, yet to be developed, of the new service. Instead, they seek waivers similar to those granted in Hye Crest Management, Inc., para. 6, supra.

52. In Hye Crest Management, the Commission found that a formal rulemaking proceeding permanently reallocating the 28 GHz band for point-to-multipoint services would be premature. The Commission stated that grant of the waiver would not lead to a de facto reallocation of the band, and, based on similar waivers in the past, that it did not anticipate "an onslaught of waiver requests." Id. at 334. Applying the waiver standard established in Big Bend

Telephone, 2 FCC Rod 2413 (1986), the Commission found the waiver standard had been satisfied because "(3) the proposed use of the frequencies will not be detrimental to their assigned users;" 6 FCC Rod at 334, para. 20.

53. Granting the several hundred waivers before us would amount to a de facto reallocation of the 28 GHz band, would be inconsistent with the Commission's suggestion that it would not grant a flood of such requests, and would be detrimental to the assigned users (potential common carrier point-to-point applicants) because spectrum awarded to waiver applicants would not be available to those assigned users. Large scale waivers also would run afoul of the guidance provided by the courts to the Commission in considering waivers, e.g., that they not undermine the purpose of the rule being waived. WALT Radio, 418 F.2d 1153 (D.C. Cir. 1969). We also see no basis for distinguishing among any of the individual requests in an equitable fashion.

#### V. PIONEER'S PREFERENCE

54. Background. The Commission's pioneer's preference rules are a means of recognizing, in the Commission's licensing process, parties that develop new communications services or technologies. The underlying rationale for such rules is to foster the development of new services and improvements to existing services by reducing for innovators the delays and risks associated with the Commission's licensing processes. Innovators of substantial new communications services and technologies have an opportunity to participate either in the new services that they took a lead in developing or in existing services with regard to which they took a lead in promoting application of new technologies.<sup>15</sup>

55. For each request before us, we have evaluated (1) whether the requester has demonstrated that its proposal constitutes a significant communications innovation; (2) whether it has made a significant contribution in developing that innovation; and (3) whether the innovation reasonably will lead to establishment of a service not currently provided or substantially enhance an existing service. In applying these criteria, we employ the pioneer's preference standards set out in our rules and applied in our previous tentative decisions that consider award of pioneer's preferences.<sup>16</sup> We consider whether a proposal is "to provide either a service not currently provided or a substantial enhancement to an existing service"<sup>17</sup> by evaluating factors that include, but are not limited to, (1) added functionality; (2) new use of

---

<sup>15</sup> The pioneer's preference regulations are codified at 47 C.F.R. §§ 1.402, 1.403, and 5.207. See Establishment of Procedures to Provide a Preference, Report and Order, 6 FCC Rod 3488 (1991), recon. granted in part, 7 FCC Rod 1808 (1992), further recon. pending.

<sup>16</sup> See, e.g., Amendment of the Commission's Rules to Establish New Personal Communications Services, supra, paras. 143-195.

<sup>17</sup> 6 FCC Rod 3488 at para. 49.

spectrum; (3) changed operating or technical characteristics; (4) increased spectrum efficiency; (5) increased speed or quality of information transfer; (6) technical feasibility; and (7) reduced cost to the public. In addition, to be eligible for a tentative award, at the time of the tentative decision a requester must have either received an experimental license and reported at least preliminary results, or submitted a written showing that demonstrates the technical feasibility of its proposal.<sup>18</sup>

56. Two pioneer's preference requests were filed in this proceeding. The first, filed by Suite 12, was accepted and placed on public notice on December 16, 1991. Comments and reply comments were received in January 1992. The second, filed by the University of Texas - Pan American (UTPA), was submitted on May 1, 1992 and dismissed on June 18, 1992 for failure to include the information required by the pioneer's preference rules and which is necessary for a full and fair analysis of pioneering proposals. UTPA filed a petition for reconsideration on July 20, 1992.

57. Suite 12 Petition for Pioneer's Preference. Suite 12 requests a pioneer's preference as the innovator and developer of a new multichannel distribution technology -- the CellularVision system -- that is capable of providing multi-channel one-way and two-way video, voice, and data services. Suite 12's companion petition for rulemaking to authorize LMDS in the 28 GHz band is based on its new multichannel distribution technology.

58. According to Suite 12, if authorized, LMDS will be the first wireless telecommunications service to employ millimeter wave transmissions on a point-to-multipoint basis and will offer one-way and two-way voice, video, and data applications within the same band of frequencies. Suite 12 states that the CellularVision system will be spectrum efficient because it will use cross-polarization isolation between adjacent cell transmitter sites -- transmitters at one cell will use vertical polarization and the adjacent cell transmitters will use horizontal polarization. Suite 12 asserts that in this manner the same frequencies will be used to connect adjacent cell sites, for the transmissions to subscribers, and for response channel transmissions from subscribers to cell sites.

59. Suite 12 asserts that it has undertaken detailed experimental programs to test its technology and that these experiments confirm that its equipment is fully functional and can be produced at costs that make LMDS economically feasible on a mass market basis.<sup>19</sup> It says that work on a prototype system began over six years ago and has culminated in the development of low cost, mass quantity production receivers and the building of transmitters.

---

<sup>18</sup> Allocate Spectrum for Fixed and Mobile Satellite Services for Low-Earth Orbit Satellites, Tentative Decision, 7 FCC Rod 1625 at para. 13 (1992); Establishment of Procedures to Provide a Preference, Reconsideration Order, supra, 7 FCC Rod 1808 (1992), further recon. pending.

<sup>19</sup> These efforts are described in Suite 12's experimental license file, call signs KA2XIG and KA2XVG.

60. WCA opposes Suite 12's request for a pioneer's preference. WCA questions the feasibility of Suite 12's proposal, contending that substantial doubts exist as to the viability of Suite 12's system in the marketplace. In WCA's view, until those doubts are resolved, the Commission would be premature to award Suite 12 a pioneer's preference. WCA also argues that Suite 12 received what is tantamount to a pioneer's preference when the Commission granted Suite 12's wholly-owned affiliate, Hye Crest Management, a license (by waiver) to construct a one-way video transmission system using the 28 GHz band in the New York Primary Metropolitan Statistical Area (PMSA).

61. In replying to WCA's opposition, Suite 12 argues that a report prepared for Suite 12 by the David Sarnoff Laboratories provides a comprehensive technical description of the viability of Suite 12's technology based on tests that the Sarnoff Laboratories performed. According to Suite 12, more than 50 companies and individuals have witnessed demonstrations of Suite 12's IMDS technology, and virtually all have felt sufficiently confident in its technical and market viability to seek licenses from Suite 12 to use it.

62. Suite 12 also maintains that Hye Crest's license is not tantamount to a pioneer's preference grant to Suite 12 because the waiver permits only a one-way video service. Because IMDS technology is capable of two-way voice and data applications in addition to one-way video, Suite 12 argues that it is seeking a pioneer's preference for a different and more sophisticated service than is the subject of the Hye Crest waiver. Suite 12 maintains that regardless of whether IMDS is viewed as a substantial enhancement of the service offered by Hye Crest or as a new service in its own right, it warrants a pioneer's preference.

63. Decision. The record demonstrates that Suite 12 is the innovator of IMDS technology and that other companies are seeking licenses to provide IMDS based on Suite 12's pioneering work. No party has challenged Suite 12's claims regarding its developmental efforts. Further, the rules proposed herein are based substantially on Suite 12's proposals in its petition for rule making. While WCA correctly observes that IMDS remains to be tested in the marketplace, the same is necessarily true of most technologies or services for which a pioneer's preference is considered. Therefore, we tentatively conclude that Suite 12 should be awarded a pioneer's preference.

64. Regarding WCA's concerns about Suite 12 already having received the equivalent of a pioneer's preference in the New York PMSA, we disagree with Suite 12 and believe that the service provided by Hye Crest in the New York City area is not substantially different from the service requested by Suite 12 for a pioneer's preference. While Suite 12 is eligible for a pioneer's preference for its proposal in this proceeding, we emphasize that a pioneer's preference for IMDS will not be awarded in more than one service area. Consequently, if a tentative preference to Suite 12 is confirmed, we will modify the authorization to Hye Crest to meet the service area, frequency, and other technical rules developed in this proceeding for the area encompassing Hye Crest's New York PMSA authorization. Alternatively, if Suite 12 informs

the Commission that it prefers a preference in the Los Angeles area,<sup>20</sup> and that Hye Crest will surrender its New York FMSA authorization at the time of issuance to Suite 12 of any LMDS license for the service area encompassing Los Angeles, we will grant it a preference for Los Angeles.

65. For the above reasons, we tentatively conclude that Suite 12 should be awarded a pioneer's preference in either the New York or Los Angeles area. If the tentative preference is confirmed and Suite 12 is otherwise qualified, it would be the only eligible applicant for one of the frequency blocks for its preferred service area.

66. UTPA Petition for Reconsideration. In its pioneer's preference request UTPA stated that it plans to employ LMDS technology "to ameliorate a critical lack of educational opportunities for the residents of the Rio Grande Valley of Texas."<sup>21</sup> Specifically, UTPA proposes to employ LMDS in the Rio Grande Valley to provide two-way point-to-multipoint video distribution of various educational material. UTPA's petition was dismissed for failure to describe or otherwise document its role in having developed a specific distinctive innovation or new technology. The dismissal states that proposing a series of applications for a new technology developed by another party, in and of itself, does not meet the requirements for award of a pioneer's preference.<sup>22</sup>

67. In its petition for reconsideration, UTPA contends that "innovative applications of technical systems -- applied technology -- are often truly revolutionary and may, in any number of ways, affect quality of life even more significantly than the development of the underlying system."<sup>23</sup> UTPA also maintains that its proposal would extend the potential of LMDS to a more advanced or effective state and thus meet the requirements of the pioneer's preference rules.

68. Decision. Our pioneer's preference rules require that an applicant "demonstrate that it (or its predecessor-in-interest) has developed the new service or technology; e.g., that it (or its predecessor-in-interest) has developed the capabilities or possibilities of the technology or service or has brought them to a more advanced or effective state" (emphasis added).<sup>24</sup> A pioneer's preference is to reward work already accomplished. Further, the

---

<sup>20</sup> In its request for pioneer's preference filed on September 24, 1991, Suite 12 specified the San Francisco FMSA as its preferred preference area; however, in an amendment filed on November 19, 1991, Suite 12 changed its request to the Los Angeles FMSA, where it had received an experimental license.

<sup>21</sup> See Petition for Pioneer's Preference, May 1, 1992, at 2.

<sup>22</sup> See letter of June 18, 1992 from Thomas P. Stanley to Steven D. Copold, at 1-2.

<sup>23</sup> See Petition for Reconsideration, July 20, 1992, at 3.

<sup>24</sup> 47 C.F.R. § 1.402(a). See Tentative Decision and Memorandum Opinion and Order, GEN Docket No. 90-314, released November 6, 1992, paras. 37-49.

work must be developmental in nature. In contrast to Suite 12, which has performed substantial developmental work and experimental testing of its IMDS technology, UTPA has provided no substantive information about any work that it has performed with regard to IMDS or similar technology. While we concur with UTPA that using Suite 12's technology to serve educational needs in the Rio Grande Valley potentially would confer substantial educational benefits on residents of this area and therefore would be commendable, the purpose of the pioneer's preference rules is not to select licensees for a service, but to reward innovative technical development. If the rules proposed herein are adopted and service is authorized generally, selecting the licensees to provide such service will be accomplished pursuant to the regular governing selection regulations, and UTPA would be eligible to apply in the normal manner. Accordingly, we treat UTPA's Petition for Reconsideration as a Petition for Review and affirm the dismissal of UTPA's pioneer's preference request.

## VI. CONCLUSION

69. We tentatively conclude that the 28 GHz band should be redesignated to accommodate multipoint technology. We propose rules designed to foster the provision of innovative services for the public interest, convenience, and necessity. We invite public comment on the tentative conclusions addressed herein and on the rules set forth in Appendix B.

## VII. PROCEDURAL MATTERS

### Ex Parte Rules - Non-Restricted Proceeding

70. The NPRM portion of this proceeding is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission Rules. See generally 47 C.F.R. §§1.1202, 1.1203, and 1.1206(a). Because it has been formally opposed, Suite 12's request for a pioneer's preference is a restricted proceeding, and ex parte presentations are prohibited. See 47 C.F.R. §1.1208. Similarly if University of Texas - Pan American's dismissed pioneer's preference request is opposed, it will also become a restricted proceeding. In addition, those waiver requests that are formally opposed or mutually exclusive are also restricted proceedings.

### Initial Regulatory Flexibility Analysis

71. Reason for action. The purpose of this NPRM is to obtain comment on the change in the fixed service usage for the 28 GHz frequency band.

72. Objectives. The objective of this proposal is to consider licensing and service rules for the development and implementation of a new technology to provide video distribution and other telecommunications services to the public.

73. Legal basis. The authority for this action is the Administrative Procedure Act, 5 U.S.C. §553; and sections 4(i), 4(j), 301, 303(r) of the Communications Act of 1934 as amended, 47 U.S.C. §§ 145, 301, and 303(r).

74. Reporting, recordkeeping and other compliance requirements. Reporting requirements are proposed to ensure that the spectrum, if redesignated for these new uses, is used to serve the public's need for communications services.

75. Federal rules which overlap, duplicate or conflict with these rules.  
None.

76. Description, potential impact and number of small entities involved. Any rule changes in this proceeding could affect MDS licensees, the majority of which are small businesses. These entities may have some additional competition from video programming service which could be provided by Suite 12's multicell technology. After evaluating the comments in this proceeding, the Commission will further examine the impact of any rule changes on small entities and set forth our findings in the Final Regulatory Flexibility Analysis.

77. Significant Alternatives. There are no presently available alternatives to the technology proposed by Suite 12.

#### Comment Dates

78. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before March 16, 1993, and reply comments on or before April 15, 1993. To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

79. For further information, contact Ms. Susan Magnotti, at (202) 634-1773, Domestic Facilities Division, Common Carrier Bureau.

Ordering Clauses

80. Accordingly, IT IS ORDERED That the Notice of Proposed Rulemaking is hereby adopted with proposed rules in Appendix B;

81. IT IS FURTHER ORDERED That the petition for reconsideration filed by University of Texas - Pan American IS DENIED;

82. IT IS FURTHER ORDERED That the 971 pending applications in the Point-to-Point Microwave Radio Service involving waiver requests listed in Appendix C ARE DENIED;

83. IT IS FURTHER ORDERED That Suite 12 Group is tentatively granted a pioneer's preference in accordance with the discussion in paragraphs 63-65 of this document;

84. IT IS FURTHER ORDERED That the Secretary shall mail a copy of this document to the Chief Counsel for Advocacy, Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

*Donna R. Searcy*  
Donna R. Searcy  
Secretary

## APPENDIX A

### Petitioners for Rulemaking

Suite 12 Group  
Video/Phone Systems, Inc.  
Harris Corporation (Farinon Division)

### Commenters to Suite 12 Group's Petition

Video/Phone Systems, Inc.  
Harris Corporation (Farinon Division)  
Wireless Cable Association, Inc.  
Cross Country Wireless Cable I, L.P.  
William B. Packer, Jr. (Packer Investments, Inc.)  
Priscilla Marston  
Dan Reiss, Esquire  
Drake Darrin (Darrin Development Group)  
William T. Lundberg (Alliance Associates)  
Richard C. Woodbridge, Esquire  
Robert G. Shepherd, Esquire  
Charles S. Brand, President, Trontech Incorporated  
Andrew Wahl (Markitstar)  
Tom Brossard  
David Jan Mitchell, Managing Partner, C/V Miami

### Commenters to Harris Corporation's Petition

Peninsula Engineering Group, Inc.  
Suite 12 Group  
Digital Microwave Corporation  
TeleSciences, Inc.  
Motorola Microwave  
American Petroleum Institute  
Calling Communications Corporation